

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



74-1032

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
:  
BERNARD MATTHEWS :

Petitioner-- Appellant :

-against- :

No. 74-1032

JULIUS MOEYKENS :

Respondant - Appellee  
:  
:  
-----X

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BRIEF FOR PETITIONER-APPELLANT

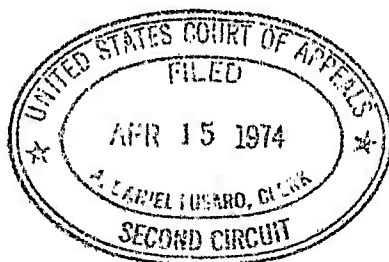
Pursuant to

ANDERS v. CALIFORNIA

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT



ERIC KRONFELD, ESQ.  
Attorney for Petitioner-Appellant  
1501 Broadway  
New York, New York 10036  
212-563-6440

-----X

	:	
BERNARD MATTHEWS	:	
	:	
Petitioner - Appellant	:	
	:	
-against-	:	No. 74-1032
	:	
JULIUS MOEYKENS	:	<u>NOTICE OF MOTION</u>
	:	
Respondent - Appellee	:	
	:	
-----X		

PLEASE TAKE NOTICE that, upon the annexed affidavit of JEFFREY L. LAYTIN, sworn to the 15th day of April, 1974, a memorandum of law, and the prior proceedings herein, the undersigned will move this Court at the United States Court House, Foley Square, New York, New York, in Room 1705, on May 20, 1974, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order permitting the withdrawal of ERIC KRONFELD, as assigned counsel for appellant.

Dated: April 15, 1974  
New York, New York

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
BERNARD MATTHEWS

Petitioner - Appellant

-against-

JULIUS MOEYKENS

Respondent - Appellee  
.  
-----X

No. 74-1032

AFFIDAVIT

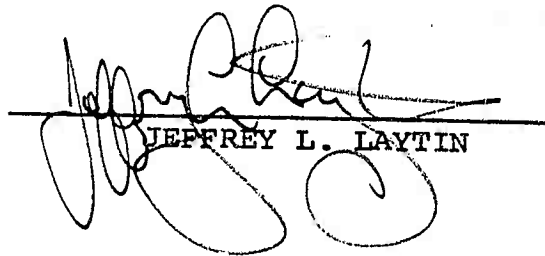
STATE OF NEW YORK     )  
                              :    ss.:  
COUNTY OF NEW YORK    )

JEFFREY L. LAYTIN, being duly sworn, deposes and says that I am an attorney associated with Eric Kronfeld, Esq., who is counsel for the Petitioner-Appellant on the above captioned appeal. This affidavit is made in support of a motion to be relieved as counsel on the ground that the record does not present any non-frivolous issue for appeal. See Anders v. California, 386 U.S. 738 (1967) and accompanying memorandum of law filed with this affidavit.

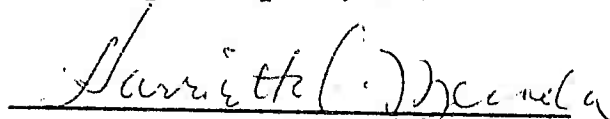
I have examined the record, including the trial transcript, the petition and other papers in this matter and finding no issues which are not frivolous, I respectfully request that the Court grant the within motion to have Eric Kronfeld relieved as counsel.

I have written to the Petitioner-Appellant to inform him of the nature of this motion and furnish him a copy of this Affidavit and the memorandum of law. A copy of that letter is annexed.

For the foregoing reasons, it is respectfully urged that the Court grant the relief requested herein.

  
JEFFREY L. LAYTIN

Sworn to before me this  
15th day of April, 1974

  
Notary Public  
HARRIETTE C. MEROLLA  
Notary Public, State of New York  
No. 31-7903385  
Qualified in New York County  
Commission Expires March 30, 1976

-----X

BERNARD MATTHEWS

Petitioner - Appellant

-against-

JULUIS MOEYKENS

Respondant - Appellee

-----X

BRIEF FOR PETITIONER-APPELLANT

ANDERS v. CALIFORNIA

ERIC KRONFELD, ESQ.  
Attorney for Petitioner-Appellant  
1501 Broadway  
New York, New York 10036  
212-563-6440

JEFFREY L. LAYTIN  
Of Counsel

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
BERNARD MATTHEWS

Petitioner - Appellant

-against-

JULIUS MOEYKENS

Respondent - Appellee  
-----X

No. 74-1032

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MEMORANDUM OF LAW  
FOR PETITIONER - APPELLANT

Pursuant to

ANDERS v. CALIFORNIA

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

QUESTION PRESENTED

Whether counsel for Petitioner-Appellant should  
be relieved on the grounds that no non-frivolous questions  
are presented on appeal.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from an order, dated November 9, 1973, in the U.S. District Court for the District of Vermont, (Holden, C. J.) (Civil Action File No. 73-301) denying the Petitioner, Bernard Matthews, a writ of habeas corpus.

Statement of Fact and Previous Proceedings

In May, 1971 Petitioner was charged with aiding and abetting assault with intent to rob, a felony in the State of Vermont. Petitioner was subsequently permitted to plead guilty to a lesser crime of aiding and abetting the operation of a motor vehicle without the owner's consent, a misdemeanor. Petitioner was sentenced to a term of not more than one year in the Windsor State Prison, Vermont on the misdemeanor charge. At the same time, Donald Goodrich, the principal of the crime, was also permitted to enter a plea of guilty to the misdemeanor of operating a motor vehicle without the owner's consent.

Upon a subsequent motion, Petitioner was allowed to withdraw his plea of guilty. The plea was stricken and upon motion of the State of Vermont, over Petitioner's objection, the original felony charge of aiding and abetting assault

with intent to rob was re-instated. Petitioner was convicted on the re-instated felony charge after a jury trial on April 24-25, 1972. The conviction was later confirmed by the Vermont Supreme Court on October 2, 1973.

While awaiting sentencing, Petitioner was charged with a further crime of arson in the first degree on June 1, 1972. The crime was committed while Petitioner was at Rutland Community Correctional Center in Rutland, Vermont. Petitioner was subsequently convicted of this charge on March 8, 1973 and sentenced to serve not less than three nor more than ten years in the state prison.

On June 2, 1973 Petitioner was sentenced on the April 1972 felony conviction to a term of not less than three nor more than ten years in state prison. However, as to this sentence, Petitioner was placed on probation with special terms, to wit, that as soon as he was legally able he would leave the State of Vermont and not return without permission of the Director of The Division of Parole, Department of Corrections, State of Vermont.

On November 18, 1973 Petitioner filed a notice of appeal from the order of Chief Judge Holden (dated November 9, 1973) denying a writ of habeas corpus and requested a Certificate of Probable Cause, which was granted by Chief Judge Holden on November 29, 1973.

Petitioner essentially contended in his Request For Certificate of Probable Cause that: (i) his conviction for aiding and abetting assault with intent to rob (under 13 V.S.A. §605) violated due process of law, because the principal had not been convicted for that crime but had been convicted of a lesser crime which Petitioner claimed was the equivalent of an acquittal, citing U.S. v. Pyle, 279 F. 290 (D.C.S.D.Cal.1921) for the proposition that an aider and abettor cannot be convicted when the principal is acquitted; and (ii) Petitioner had not had a fair hearing on the habeas corpus proceeding because he had been denied assistance of legal counsel.

#### Statement of Legal Issues

##### I

PETITIONER WAS NOT DENIED DUE PROCESS BY CONVICTION FOR AIDING AND ABETTING A FELONY WHERE THE PRINCIPAL WAS CONVICTED OF A LESSER MISDEMEANOR CHARGE.

Petitioner's basic contention is that his conviction, pursuant to 13 V.S.A. §605, of aiding and abetting assault with intent to rob violated due process because the principal of the crime was convicted of a lesser offense.

Petitioner contends that "if the principal is acquitted there can be no prosecution of the accessory".

As support for this proposition, Petitioner cites United States v. Pyle et al., 279 F.2d 100 (D.C.S.D.Cal.1921), a case which was decided on an interpretation of Rev. St. §5209, involving the embezzlement of funds from a national bank. Pyle was decided on narrow technical grounds and is wholly distinguishable from the instant case. See, 18 U.S.C.A. §1005, Giragosian v. United States, 349 F.2d 167 (1st Cir. 1965).

As Chief Judge Holden states in his order of November 9, 1973, statutes in most jurisdictions have abrogated the distinction between principals and accessories. See, La Fave and Scott, Criminal Law 500-501 (1972). See, e.g. 18 U.S.C.A. § 2(a,b). The statute applicable to the instant case is 13 V.S.A. § 3 which provides:

"A person who aids in the commission of an offense punishable by death or imprisonment in the state prison shall be punished as a principal."

It follows, a fortiori, that since assault with intent to rob is punishable by imprisonment in the state prison, 13 V.S.A. §§ 605,606, Petitioner's conviction as an accessory may stand even if the principal was acquitted.

The prevailing case in the Second Circuit is United States v. Deutsch, 451 F.2d 98 (2nd Cir. 1971), cert. denied, 92 S.Ct. 682. The Court held:

"To sustain the conviction of one who has been charged as an aider and abettor, it is necessary that there be evidence showing an offense to have been committed by the principal and that the principal was aided and abetted by the accused; it is not incumbent upon the prosecution, however, to prove that the principal has been either convicted or acquitted of the offense." 451 F.2d at 118-9.

For a thorough analysis on this point, see, United States v. Bryan, 483 F.2d 88 (3rd Cir. 1973) (en banc).

Petitioner does not claim that the prosecutor either failed to present evidence showing the commission of an offense by the principal or that the principal was aided and abetted by Petitioner. The fact that the principal was convicted of a lesser offense is wholly immaterial. Therefore, Petitioner's claim that his conviction violated due process must fail.

II

PETITIONER WAS NOT DENIED A FAIR HABEAS CORPUS HEARING IN FEDERAL DISTRICT COURT BECAUSE HE ACTED WITHOUT THE ASSISTANCE OF COUNSEL IN PREPARING HIS PETITION.

Petitioner also raises the issue as to whether he was "given a fair habeas corpus proceeding in the Federal District Court in view of the fact that he was denied the assistance of counsel."

Under the Criminal Justice Act of 1964, Congress has authorized the appointment of counsel to represent indigents in direct criminal appeals. 18 U.S.C.A. §3006 A Such authority has not extended as a matter of right to legal representation in collateral attacks on criminal convictions. As the Court stated in LaClair v. U.S. 374 F.2d 486 (7th Cir. 1967):

"...appointment of Counsel for indigents in habeas corpus and statutory post conviction proceedings rests in the sound discretion of district courts unless denial would result in fundamental unfairness impinging on due process rights."

Furthermore, as stated in U.S. ex rel Worlow v. Pate, 411 F.2d 972,974 (7th Cir. 1969):

"The Courts have consistently held, however, that although the right to counsel has been



consistently expanded, it does not necessarily include the right of a prisoner to have an attorney prepare collateral attacks in post-conviction proceedings."

See also, U. S. ex rel Marshall v. Wilkens, 338 F.2d 404 (2nd Cir. 1964).

The Supreme Court has noted with approval the practice of the Federal Courts in exercising their sound discretion to appoint counsel in such post conviction proceedings only after such court determines, "that issues are presented calling for an evidentiary hearing." Johnson v. Avery, 393 U.S. 483,487 (1969). See also Developments in the Law - Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1202-05 (1970); Federal Habeas Corpus: A Study in Massachusetts, 87 Harv.L.Rev. 321, 342-346 (1973).

The very nature of the Criminal Justice Act was from its inception, and case law so upholds, conceived with some very basic limitations such as are set forth in the Report to the Committee to Implement The Criminal Justice Act of 1964 (1965), House Document No. 62, 89th Congress, First Session at pp. 4-5:

"Two specific limitations on the scope and applicability of the new statute are imposed by the terms of the [Criminal Justice] act or made clear from this legislative history. First, the act does not apply in habeas corpus proceedings, in

proceedings to vacate sentences, brought under 28 U.S.C.A. § 2255 [Federal Custody; Remedies on Motion Attacking Sentence] or on any other proceeding of a similar character which is collateral to the original case."

There is, therefore, ample evidence to support the proposition that federal courts have discretionary authority to appoint counsel in collateral proceedings and Petitioner's claim must fail.


#### Conclusion

Petitioner's conviction for aiding and abetting assault with intent to rob, where the principal was not convicted for that crime, but pleaded guilty to a lesser offense, provides no basis for granting a writ of habeas corpus.

Petitioner was not entitled, as of right, to counsel in the habeas corpus proceeding nor did it in any way affect the fairness of such habeas corpus proceeding.

It is therefore respectfully requested than  
an order be granted permitting Eric Kronfeld to withdraw  
as assigned counsel for Petitioner-Appellant.

Respectfully submitted,



ERIC KRONFELD, ESQ.  
Attorney for Petitioner-Appellant  
1501 Broadway  
New York, New York 10036  
212-563-6440

JEFFREY L. LAYTIN  
Of Counsel

APPENDIX

*Law Offices*  
*Machat*  
*&*  
*Kronfeld*

MARTIN J. MACHAT  
ERIC KRONFELD  
JEFFREY LAYTIN

30<sup>TH</sup> FLOOR  
PARAMOUNT BUILDING  
*1501 Broadway, New York, N. Y. 10036*  
LONGACRE 3-6440  
CABLE: "MARTMACHAT, NEW YORK"

April 15, 1974

Mr. Bernard Matthews  
c/o State Correctional Facility  
State of Vermont  
Windsor, Vermont

Re: Matthews v. Moeykens  
United States Court of Appeals  
Second Circuit  
Docket No.: 74-1032

Dear Mr. Matthews:

Pursuant to the Criminal Justice Act of 1964, Eric Kronfeld, Esq., has been appointed to represent you in the above referred to matter.

Please be advised that as of this date a motion has been made to the United States Court of Appeals for the Second Circuit to have Eric Kronfeld, Esq. relieved as counsel on the ground that the case does not present any non-frivolous issue for appeal.

Enclosed herein, please find a copy of a revised Memorandum of Law superseding that sent you on April 1, 1974, explaining the nature of and reasons for said motion.

Very truly yours,

  
Jeffrey Laytin

Enclosure  
h

UNITED STATES DISTRICT COURT

FOR THE,

DISTRICT OF VERMONT

Bernard Matthews

v.

Julius Moeykens

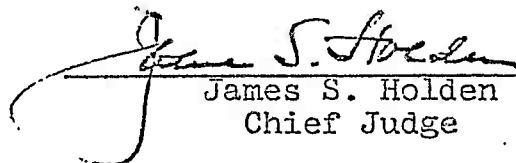
Civil Action

File No. 73-301

ORDER ON REQUEST FOR CERTIFICATE OF PROBABLE CAUSE

Petition having been brought pursuant to Rule 22, Fed. R. App. P. for a certificate of probable cause so as to permit appeal to the U.S. Court of Appeals for the Second Circuit from the judgment entered in District Court, I do certify that there is probable cause to appeal, and in view of the indigence of petitioner that the appeal should be carried forward in forma pauperis.

Dated at Rutland, in the District of Vermont, this 29<sup>th</sup> day of November, 1973.

  
James S. Holden  
Chief Judge

*Filed November 29, 1973*  
*Christine M. Weber*  
*Deputy Clerk*

United States District Court  
For The  
District of Vermont

Bernard Matthews  
V.

Civil Action

Julius Roeykens

File No. 73-301

Request for Certificate of Probable Cause

Now Comes Bernard Matthews, Petitioner in the above entitled action, and request the Honorable Court pursuant to Rule 22, F.R. App. P., for a certificate of probable cause to appeal the judgement of this Court rendered November 9, 1973, to the United States Court of Appeals for the Second Judicial Circuit. The issues which petitioner wishes to appeal are the following;

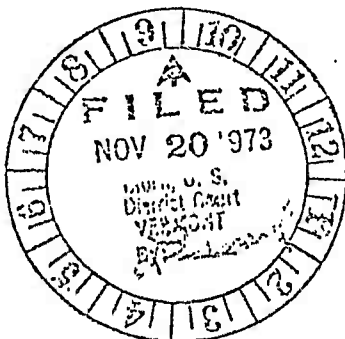
1. Was Petitioner's conviction invalid under the "Due Process Clause" of the Fifth Amendment to the United States Constitution, because he was convicted as an accessory to a felony, when the principal of the crime was convicted for a misdemeanor?

2. Was petitioner given a fair habeas corpus proceeding in the Federal District Court in view of the fact that he was denied the assistance of counsel?

Petitioner appeals these issues in good faith, believing that they are meritorious and non-frivolous.

DATED at Windsor, Vermont, this 18 day of November, 1973.

*Bernard Matthews*  
Bernard Matthews, Pro se  
Box 26  
Windsor, Vermont



United States District Court  
For The  
District of Vermont

Bernard Matthews

v.

Julius Moeykens

Civil Action

File No. 73-301

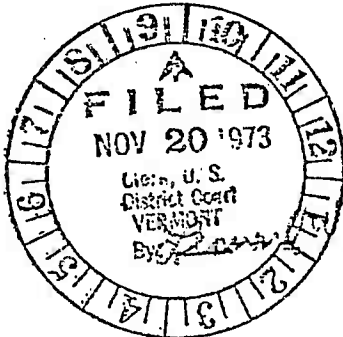
Notice of Appeal

Bernard Matthews, Petitioner, hereby gives notice that he will appeal the order handed down by this Court on the 9th day of November, 1973, to the United States Court of Appeals for the Second Judicial District, Foley Square, N.Y., N.Y.

DATED at Windsor, Vermont, this 18 day of November, 1973.

*Bernard Matthews*

Bernard Matthews, Pro se  
Box 26  
Windsor, Vermont





UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT :

Bernard Matthews )

v. )

Julius Moeykens )

Civil Action

File No. 73-301

ORDER

*Edward J. Gendron*

This order relates to a petition for a writ of habeas corpus which has been filed by Bernard Matthews, who is an inmate at Vermont State Prison. In his petition Matthews states that he was convicted, after a trial by jury, of "aiding and abetting assault with intent to rob," in violation of 13 V.S.A. § 605, and was sentenced on June 2, 1972, to serve three to ten years in prison. That sentence was suspended. Matthews is currently confined under another conviction. His conviction on the §605 violation was affirmed by the Vermont Supreme Court on October 2, 1973. In addition to seeking a writ of habeas corpus, Matthews has filed a motion to proceed in forma pauperis.

Petitioner contends that his conviction under § 605 violated due process because the principal of the crime which he was accused of aiding and abetting was not convicted of that crime, assault with intent to rob, but rather was convicted of a lesser offense, operating a motor vehicle without the owner's consent. In support of his claim, petitioner contends that "if the principal is acquitted there can be no prosecution of the accessory."

While it is true that at common law the conviction of the principal offender was a necessary precondition to the

conviction of any accessory, this rule has been abolished by statutes in most jurisdictions which make an accessory liable as a principal,<sup>in</sup> effect abrogating the distinction between principals and accessories. See LaFave and Scott, Criminal Law 500-501 (1972). Vermont has enacted such a statute, 13 V.S.A. § 3, which at the time of petitioner's conviction provided:

"A person who aids in the commission of an offense punishable by death or imprisonment in the state prison shall be punished as a principal."

Assault with intent to rob is punishable by imprisonment in the state prison. 13 V.S.A. §§ 605, 606. Thus under 13 V.S.A. § 3 petitioner's conviction as an accessory may stand even if the principal offender was not convicted. In aiding the commission of assault with intent to rob, Matthews, under 13 V.S.A. § 3, became subject to criminal liability independent of other participants in the crime.

In any event, petitioner does not claim that the principal offender in his case was acquitted. Matthews merely claims that the principal was convicted on a reduced charge. It is, of course, necessary "for the prosecution to show, on trial of the accessory, that the crime was committed, as well as whom and how the defendant aided in its commission." LaFave and Scott, Criminal Law 501 (1972). Matthews does not contend that his trial lacked such evidence.

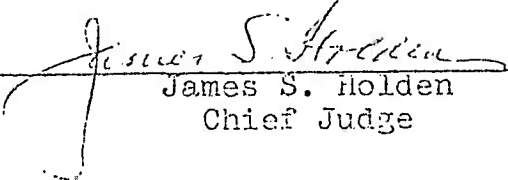
In consideration of the above, it is hereby ORDERED:

The motion of the petitioner to proceed in forma pauperis is granted.

The petition for a writ of habeas corpus is denied.

Dated at Montpelier, in the District of Vermont, this

9th day of November, 1973.

  
James S. Holden  
Chief Judge

United States District Court

For The

District of Vermont

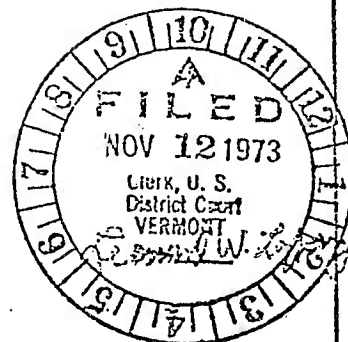
Bernard Matthews

V.

Julius Moeykens

Civil Action File No.

Petition for a Writ of Habeas Corpus



Bernard Matthews, Petitioner, moves the Honorable Court to issue it's Writ of Habeas Courts, and presents the following:

Jurisdiction

1. This Court has jurisdiction under Section 2241 of Title 28, U.S.C.
2. Petitioner has attempted post-conviction relief in state court, but there is no remedy available to him because he does not satisfy the "in custody" requirements under Vermont Law. See: petitioner's exhibit 'A'

Facts

3. Petitioner was convicted by jury trial for the crime of "aiding and abetting" assault with intent to rob", in violation of Sec. 605, Title 13, V.S.A. in the Vermont District Court, Addison Circuit, and was sentenced on the 2nd day of June, 1972, to serve not less than three (3) years and not more than ten (10) years in prison. The sentence was suspended with the condition that he leave the State of Vermont, Mittimus appended hereto as exhibit 'B'.
4. Petitioner is presently confined in the State Correctional Facility, at Windsor, Vermont, pursuant to another mittimus.
5. Defendant Julius V. Moeykens, is the Superintendant of said facility and has immediate control over petitioner.

Claim

6. Petitioner alleges that he is confined in violation of the Constitution of the United States and more particularly the "due process clauses" of the Fifth and Fourteenth Amendments thereto in that; the Vermont District Court was without jurisdiction to convict and sentence him for the heretofore described crime.
7. Petitioner claims that under the common law, and under the statutory laws of the United States and the State of Vermont, there must be a principal of a crime if there is to be an accessory.

8. The principal of the crime to which petitioner was alleged to aid and abet, was one Donald Goodrich. Mr Goodrich, was convicted of "Operating without the Owner's Consent", a misdemeanor.

9. Petitioner claims that under the federal law; " If the principal is acquitted there can be no prosecution of the accessory". U.S. V. Pyle, 279 F 290., Rooney V. U.S. 203 F 928.

10. Because of the foregoing petitioner, prays that this Court will find fact in his favor and Order him discharged from custody.

Respectfully Submitted

*Bernard Matthews*

Bernard Matthews, Pro se  
Box 26

- Windsor, Vermont

The foregoing allegations were sworn to as the truth before me this <sup>16</sup> day of October, 1973, at Windsor, County of Windsor, State of Vermont.

Notary Public.

*Paul W. Libby*

STATE OF VERMONT  
WINDSOR COUNTY, S. S.

BERNARD MATTHEWS

WINDSOR COUNTY COURT

vs

JULIUS V. MOEYKENS

DOCKET NO. -637-73-WRM

JUDGMENT ORDER

The above entitled cause, A Petition for a Writ of Habeas Corpus, came on for hearing before the Windsor County Court on 18 July 1973. The Petitioner was present in Court and represented by George E. Rice, Jr., Deputy Defender General; the Petitioner was represented by Richard Finn, Esquire, Assistant Attorney General.

Petitioner represented to the Court that since the filing of his Petition for a Writ of Habeas Corpus for release from his incarceration as the result of a sentence from the Vermont District Court, Circuit 2, Addison Circuit; he has been convicted of the crime of Arson by the Vermont District Court, Rutland Circuit and in April of 1973 was sentenced by that Court to a term of three (3) to ten (10) years.

Petitioner pro se in open Court, following the above representations, requested the Court to assign to him a different attorney as George E. Rice, Jr. was one of the persons named in allegation NO. 19 in his Petition for a Writ of Habeas Corpus.

Upon consideration of the Petition, the file, records and oral representations of the Petitioner the Court makes the following findings of fact:

FINDINGS OF FACT

- 1.) Petitioner was convicted of aiding and abetting one Donald C. Goodrich while said Goodrich was armed with a dangerous weapon, to wit, a .22 caliber revolver to assault one Ralph Sampson with intent to rob said Sampson of personal property, to wit, a 1969 Oldsmobile sedan, then and there in the possession of said Sampson, in violation of 13 V S A 3 and 605.

FILED

JUL 19 1973

JANE V. NEWMAN  
WINDSOR COUNTY CLERK

PHOTOCOPYED COPY

2.) Petitioner was sentenced by the Vermont District Court, Addison Circuit to not less than three (3) years nor more than ten (10) years, which sentence was suspended upon the condition that Petitioner leave the State of Vermont.

3.) Petitioner appealed the Judgment and Sentence to the Vermont Supreme Court where the same is pending.

4.) Petitioner filed a Writ of Habeas Corpus with the Windsor County Court on 15 March 1973 contesting the jurisdiction of the Vermont District Court, Addison Circuit.

5.) On 15 March 1973 Petitioner was convicted of Arson in the Vermont District Court, Rutland Circuit and in April 1973 was sentenced to three (3) to ten (10) years. He is presently incarcerated at the State Prison in Windsor, Vermont on that sentence.

#### CONCLUSIONS OF LAW

It is well settled that a prisoner has no right to a Writ of Habeas Corpus unless he is entitled to immediate release. In Re: Bryant 129 Vt 302, 306

Assuming arguendo that Petitioner was entitled to release under his Petition for Habeas Corpus, he is serving a sentence for another offense meted out by another Court, and under such existing conditions could not be eligible for immediate release in any event.

An order for the assignment of different counsel to represent Petitioner is no longer appropriate.

#### JUDGMENT ORDER

It is thereupon Ordered that Petitioner's Petition for a Writ of Habeas Corpus is dismissed and Petitioner is remanded to the Custody of the Commissioner of Corrections and/or Julius Moeykens, Warden, Vermont State Prison.

A Copy of these findings, conclusions of law and judgment order are to be furnished forthwith to Petitioner, Petitioner's Attorney, Attorney General and Julius Moeykens, Warden.

FILED

JUL 19 1973

JANE W. NORMAN  
WINDSOR COUNTY CLERK

The findings, conclusions of law and judgment order are all made a part of the record for the purpose of review by the Supreme Court.

Dated at Woodstock, County of Windsor f State of Vermont this 19th day of July, 1973.

*Stephen Underwood*

*Bernard H. Taylor*

*George M. Nelson*

JUDGES, WINDSOR COUNTY COURT.

CONFIRMED COPY

FILED

JUL 19 1973

JANE W. MORTON  
WINDSOR COUNTY CLERK

PHOTOGRAPHIC COPY



Because the Petitioners' sentence was suspended, there is no mittimus at the prison to supply as an Exhibit.

The Vermont District Court sentenced petitioner to serve not less than three (3) years and not more than ten (10) years.

The sentence was suspended with the provision that petitioner leave the State of Vermont.

The sentence was given by Judge Hilton Dier, in the District Court, Addison Circuit, on June 12, 1972.

Bernard Matthews  
Box 26  
Windson, Vermont

Exhibit 'B'

Petitioner for writ of Habeas Corpus

C. Bernard Matthews, Petitioner in the above entitled cause, and moveable court to issue it, a writ of Habeas Corpus," and shows the Court

is action arises under the First, Fifth and Fourteenth Amendments to the United States Constitution, as will hereinafter more fully appear.

The jurisdiction of this Court is invoked under Sections 3951-56, of Vermont Statutes annotated.

C. Petitioner is presently confined in the State Correctional Facility at Montpelier, Vermont, because he is unable to supply bail in the amount required by the District Court, Rutland Circuit.

Jurisdiction

C. Petitioner is not presently physically confined because of the conviction as now ascribed, however, Petitioner right to go where and when he pleases is restricted by the herein challenged conviction.

In 1863 the United States Supreme Court took care to explain the requirements of the writ, as far as the requirements to be entitled to the "great writ."

In Jones v. Cunningham, 371 U.S. 236, 240 (1955) the Court said;

"History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, which have been thought sufficient in the English speaking world to support the issuance of habeas corpus."

(Emphasis added):

"... what matter is that they significantly restrain petitioner liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the "great writ"

Statement of the Case

C. Petitioner was on the 25th day of April, 1972, convicted by a jury trial of "aiding and abetting armed robbery," in violation of section 24, V.S., in the Vermont District Court, Madison Circuit. Petitioner was sentenced to (here:restrained): not less than three years and not more than five years in State Prison.

The Court, however, suspended the sentence with the provision that the Petitioner remain in the State of Vermont. The sentence at this time is still in the State of Vermont.

6. The conviction has been appealed to the Vermont Supreme Court and is scheduled to be argued some time in April, 1973, in the office of the Defender (4333a--). General as Docket No. 100-72.

The Assistant Defender General will not present the issue to the State's highest court.

Petitioner is a layman and illiterate, and is without adequate facilities to conduct his own defense. He is unable to read or write, and therefore cannot file briefs with the Supreme Court. The State would necessarily require more time to oppose him and the appeal would be dragged out infinitely.

#### Allegations

7. Petitioner alleges that the trial court was without jurisdiction to try, convict, and sentence him for the crime of "aiding and abetting Armed Robbery", as any trial for that crime would be a plain violation of the Petitioner's rights under the Fifth Amendment to the United States Constitution to be free from Multiple Prosecutions for the Same Offense.

8. Petitioner further alleges that above described prosecution was intended and designed to punish the Petitioner because he had the nerve to exercise his inalienable right to petition the Courts of Justice for relief.

9. Petitioner further alleges that the above described prosecution was in truth persecution, and (~~violates~~) violated the basic, fundamental concepts of the equal protection of the law commanded by the Fourteenth Amendment to the Constitution of the Fourteenth Amendment of the United States.

10. The facts surrounding the Petitioner's allegation, are that, Petitioner was arrested on May 16, 1971, at Middlebury, Vermont and charged with the crime of aiding and abetting one Donald Goodrich in the assault with intent to rob one Ralph Sampson on May 15, 1971.

On August 9, 1971, the State dropped the charge of Assault with intent to Rob and allowed the Petitioner to plead guilty to the crime of "aiding and abetting operating a car without the owner's consent."

The sentencing court sentenced the Petitioner to serve nine months in prison for the crime.

The principle, Donald Goodrich, entered a plea of guilty to the reduced charge of "operating without the owner's consent."

11. Petitioner subsequently filed Motion to Vacate Sentence in the Addison County Court, and on February 9, 1972, the Court through out the conviction on the ground that a person cannot be convicted as an accessory to a misdemeanor.

12. Over the objections of the Petitioner the Vermont District Court, Addison Circuit, allowed the State to re-instate the original charge that had been dropped and the Petitioner was tried for "aiding and abetting assault with intent to rob."

13. Petitioner contends that once the State dropped the charge and allowed the Petitioner to plead to a lesser offense the State was barred from a subsequent prosecution for the (s) greater offense.

It was said by the Court in *Skoberg V. U.S.* 167 F2d 380, 386 (1948) that

"The conviction and sentence for the lesser included offense would constitute a bar, under the double jeopardy clause of the Constitution, to a subsequent prosecution for either the greater or lesser included offense involved in the same transaction."

14. Petitioner contends ( 1 ) once the charge of "assault with intent to rob" was dropped against the principal ( Donald Goodrich ) , and the principal was convicted of "operating without the owner's consent," it was equivalent to an acquittal on the first charge.

15. As the effect of this prosecution the Petitioner was named an accessory, and was continued to be prosecuted as such. The common law distinction between principals and accessories was used in large part abolished under federal law by section 2 of Title 18 of the United States Code, and now for all practical purposes only accessories and principals are recognized. ( Kelly v. U. S. 73 Fed 228 ) It is unnecessary that the principal be first prosecuted or convicted before prosecution of an accessory. ( Kaufman v. U.S. 212 Fed 13 ) But surely if the principal is (a) acquitted there can be no prosecution of the accessory. ( U.S. v. Fyle, 279 F280, 100 F.2d 100 F280. )

16. Because of the foregoing, Petitioner claims that the principal was acquitted of the prime charge, and thus the Court was without jurisdiction to try the Petitioner as an accessory.

17. Petitioner claims that the equal protection clause of the 14th Amendment means equal punishment according to the offence. In this case the principal, Mr. Donald Goodrich, was given a sentence similar to the petitioner for the crime of "operating without the owner's consent," which was tantamount to one year in jail. However Mr. Goodrich having a long record, and being accustomed to dealing with Vermont Authorities, promised the Parole Board that he would be an Informer for the State, and was immediately paroled. Mr. Goodrich did less than 90 days in jail for this crime.

Petitioner, not using an informer, would have to do the entire sentence, and naturally when he petitioned the Courts of Justice for relief, the State felt they were duty bound to make an example out of an American Citizen that dared to exercise his rights under the First Amendment to Petition the Courts Justice for a legal finding of fact.

18. Petitioner properly objected to the trial on the grounds set forth in this petition, as will appear by Petitioner's Exhibit A;

The Printed Case now on file with the Vermont Supreme Court, appended to this Petition.

19. Because the Public Defender, Mr. Karl E. Haase, and the (a) Assistant Defender General Mr. George Rice Jr., vows as members of the Vermont Bar; and have ridiculed their consciences of ethics as lawyers, and have chosen to conceal the Star Chamber prosecution of this indigent person; Petitioner asks the honorable Court to appoint him counsel not connected with the Public Defender's Office.

...the Court will grant the Petitioner's request that the Petitioner's  
...will find that the Petitioner's  
...the presence of law, of constitutional discussion regarding  
...to be withdrawn.

Respectfully,

*[Signature]*

Bernard Matthews, P.O. 30  
30 x 33  
Windsor, Ont.

The foregoing allegations were submitted and sworn to as the truth before me  
this 12 day of March, 1975, at Windsor, Ontario

*[Signature]*  
Justice of the Peace

Petition prepared by

William H. Jager

C  
O  
P  
7  
L

United States District Court  
For The  
District of Vermont

Bernard Matthews

V.

Julius Mozykens

Motion for leave to proceed  
in Forma Pauperis and for  
Appointment of Counsel  
Docket No.

Petitioner Bernard Matthews, moves this court for an order permitting him to file this action in forma pauperis without prepayment of fees and costs or security therefore, and appointment of a member of the Vermont Bar, to represent petitioner as provided in 28 U.S.C. Sec. 1915, because as the attached affidavit indicates, petitioner is unable to pay such costs or give security therefore, and cannot afford to employ an attorney. This motion is based on the petition for Writ of Habeas Corpus and affidavit attached hereto and submitted herewith.

DATED at Windsor, County of Windsor, State of Vermont, this 10 day of October, 1973.

Bernard Matthews  
Bernard Matthews  
Box 26  
Windsor, Vermont 05089

Christine M. Wilberg  
Deputy Clerk

In The United States District Court  
For The  
District of Vermont

Bernard Matthews

V.

Julius Moeykens

Civil Action File No.

State of Vermont

Windson County

SS:

Affidavit

Bernard Matthews, being duly sworn deposes and says:

1. I am the petitioner in the above entitled action.
2. I believe I am entitled to the relief sought in the attached petition against the above named defendant.
3. I have read and know the contents of the attached petition for writ of habeas corpus and know them to be true in as far as I am able to ascertain.
4. Because of my poverty I am unable to pay the costs necessary of an action or to give security therefore, or to employ an attorney.

*Bernard Matthews*

Bernard Matthews

Subscribed and sworn to before  
me this 10<sup>th</sup> day of October, 1973.

Notary Public.

*Paul W. Howe*

Page 1

STATE OF VERMONT

DISTRICT COURT OF VERMONT, UNIT No. 2 Addison Circuit

CRIMINAL DOCKET AND RECORD NUMBER 301-71-PCC

Entered May 16 1971 Date of birth 9/17/45 Age 25  
State vs. Bernard F. Matthews Place of birth Somerville, Mass.  
Residence Somerville, Mass. Occupation Construction Worker  
Offence or crime A&A Assault w/intent to kill Op. Lic. No. \_\_\_\_\_  
Arrested on 4/11/71  
Appointed Guardian Ad Litem 2/17/71

Prosecuted by { State's Attorney Dike Indicate Y Guilty 3/7/71 A&A occ.  
Grand Juror \_\_\_\_\_ plea X Not Guilty 5/17/71  
by X Nolo Contendere.

Counsel for respondent Deppman Bail \$ 5,000 Sureties \_\_\_\_\_  
Continued to \_\_\_\_\_ 19 \_\_\_\_\_ Date of trial by { (1) Court \_\_\_\_\_ 19 \_\_\_\_\_  
Judgement or verdict Guilty Date 8/7 19 71 (2) Jury \_\_\_\_\_ 19 \_\_\_\_\_  
Sentence 3/7/71 Not Guilty - 9 months House of (3) over to \_\_\_\_\_  
Correction

Fine of \$ \_\_\_\_\_ and Cost of \$ \_\_\_\_\_ were paid \_\_\_\_\_ 19 \_\_\_\_\_

Alternative sentence \_\_\_\_\_  
Date of Report to Department of \_\_\_\_\_  
- Motor Vehicles - Public Safety 2/9 19 71 Mitimus-Jail-Probation- 2/9 19 71

On \_\_\_\_\_ 19 \_\_\_\_\_ sentence was suspended and respondent placed on probation on the usual and following special condition \_\_\_\_\_

Other proceedings 6/11/71 Bail hearing - reduction denied. Pre trial order  
for 6/14/71 Deposition of Sgt. Loran, T. Herring & P. Sanford filed 7/1/71  
Motion for transcript filed 7/1/71 - denied w/o fee.  
2/10/72 Order from Addison Co. Court - respondent's petition granted,  
plea of guilty stricken, case returned to Dist Ct. for further  
action - \$5,000 cash bail reinstated. 2/17/72 Not guilty p.c.c.  
entered. State's motion of strike against original  
Charge reinstated. 2/23/72 Bail hearing 4/17/72 Motion filed &  
Subsequently withdrawn same date.  
Sgt. filing drawing 4/24/72.

A TRUE RECORD

Attest:

Judge - Clerk



## STATE OF VERMONT

DISTRICT COURT OF VERMONT, UNIT NO.

CIRCUIT

CRIMINAL DOCKET AND RECORD NUMBER 201-71-A-5

Entered 2/17/72

Date of birth Age

State vs. Bernard F. Matthews

Place of birth

Residence

Occupation

Offence or crime A. &amp; A. assault w/ intent to kill Op. Lic. No.

Appointed Guardian Ad-Litem C. A. returned from Galloway County Court 2/18/72

Prosecuted by { State's Attorney Office Indicate Guilty

Grand Juror plea X Not Guilty 2/17/72

by X Nolo Contendere

Counsel for

respondent House, assigned

Bail \$

Sureties

Continued

to

19

Date of trial by { (1) Court

19

Judgement or

verdict Guilty

Date

4/25/72

(2) Jury

4/25/72

Sentence

Judgment on Verdict 5/22/72

Bound

(3) over to

more than 10 yrs State Prison at Windsor

Fine of \$ and Cost of \$ were paid

19

Alternative sentence

Date of Report to Department of

- Motor Vehicles - Public Safety

19

Mittimus-Jail-Probation

19

On June 2, 1972, sentence was suspended and respondent placed on probation on the

usual and following special condition. That respondent shall leave St. of Vt. as soon as he

is legally able to do so &amp; shall not return to St. of Vt. w/o written permission

of Director of Division of Probation &amp; Parole of Dept. of Correction

Other proceedings 4/24/72 Respondent's motion to disqualify, dismiss, produce

&amp; memorandum filed. Hearing on Motions - all motions denied 4/24/72

Jury drawing continued to 4/25/72. Judgment stayed for filing of

motion to 5/12/72. Time extended to 5/15/72. Motion for Judgment

Notwithstanding Verdict or Judgment of acquittal filed 5/15/72. Motion

for New Trial filed 5/15/72. Hearing 5/22/72 on both motions - de

as to both. Judgment on Verdict entered 5/22/72. Pre-sentence

ordered. Pre-sentence filed 6/1/72. Sentencing 6/2/72. Notice of appeal

filed 6/12/72. Order for transcription filed 6/15/72. File &amp; docket

Attest:

Judge Clerk

MITTIMUS TO HOUSE OF CORRECTION

STATE OF VERMONT.

Addison County, ss.

To ANY SHERIFF OR CONSTABLE IN THE STATE.

GREETING:

WHEREAS, Bernard F. Matthews of Somerville, Mass. in the  
County of \_\_\_\_\_ by consideration of the Vermont District Court, Addison Circuit  
~~Municipal Court~~ was on the 9th day of August, 19 71  
duly convicted of the crime of aiding & abetting operating without owner's consent.  
and was thereupon by said Court sentenced to be confined, at hard labor, in the House of Correction, in Windsor, in  
the County of Windsor, for and during the term of ~~not less than~~ 9 years 0 months 0 days, from the date of commitment of  
~~not more than~~ 9 years 0 months 0 days, from the date of commitment of  
said Bernard F. Matthews to said House of Correction;

and to stand committed until sentence is complied with; therefore:

By THE AUTHORITY OF THE STATE OF VERMONT, you are hereby commanded forthwith to commit the body of  
the said Bernard F. Matthews to the Superintendent of the House of Correction, in  
Windsor, in the County of Windsor, within such House of Correction, who is hereby commanded to receive the said  
Bernard F. Matthews and him confine and employ at hard labor, in said  
House of Correction, strictly in accordance with such sentence, or until he is sooner discharged by order of law.

HEREOF FAIL NOT, BUT DUE SERVICE AND RETURN MAKE ACCORDING TO LAW.

Dated at Middlebury in said County of Addison  
this 9th day of August, 19 71

Hilton L. Dier, Jr. Judge  
Clerk

STATE OF VERMONT,

At Middlebury in said County, this

Addison County, ss. } 9th day of August 1971, by virtue of

this mittimus I apprehended the body of the within named Bernard F. Matthews  
and read the same in his hearing; and on the 9th day of August, 1971, at  
Windsor, in the County of Windsor, I committed the said Bernard F. Matthews  
to the Superintendent of the House of Correction, within said House of Correction, and left with said Superintendent a true and attested copy of this mittimus, with this, my return thereon endorsed.

Attest Gary W. Bushey  
Deputy Sheriff - Constable

FEES:

Travel \_\_\_\_\_ miles \$ A True Copy, Attest: Gary W. Bushey  
Two copies, \$ \_\_\_\_\_  
\$ \_\_\_\_\_  
Deputy Sheriff

Docket No. \_\_\_\_\_

MUNICIPAL COURT

STATE OF VERMONT

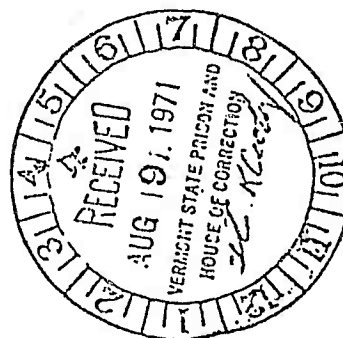
VS.

MITTIMUS TO  
HOUSE OF CORRECTION

TERM OF SENTENCE

Minimum

Maximum



FOR THE COURT

DATE: May 31, 1972

P.O. Marcus A. Carr

TO: Vermont District Court  
Addison Circuit, Unit No 2  
Middlebury, Vermont  
Judge Hilton H. Dier

DEFENDANT: Bernard Frederick Matthews

DOB: September 17, 1945

RESIDENCE: 106 Baldwin Road  
Billerica, Massachusetts

AGE 26 years

POB: Sommerville, Mass.

OFFENSE: Aiding & Abetting Assault  
With Intent to Rob (felony)

PLEA: Not Guilty

STATE'S ATTORNEY: Ezra S. Dike

DOCKET NO: 801-71acr

DEFENSE ATTORNEY: Carl Neuse

DATE CONVICTED: April 25, 1972 - Jury Verdict  
of Guilty

COMPLAINT:

On to wit, the 15th day of May AD, 1971 did then and there aid and abet one Donald C. Goodrich, while said Goodrich was armed with a dangerous weapon, to wit, a .22 caliber revolver to assault one Ralph Sampson with intent to rob said Sampson of personal property, to wit, a 1969 Oldsmobile Sedan, then and there in the possession of said Sampson, in violation of 13 VSA 3 and 605.

ARREST SUMMARY:

Following is a summary of state police case no. 357-512:

At 3:19 p.m. on May 15, 1971 the State Police at Rutland, Vermont received a Complaint by phone from Sampson of Ripton that his car had been stolen. The message was relayed to the Middlebury State Police, and Trooper Michael Herring was assigned. He proceeded to the Robert Dragon home in Ripton, Vermont and met with the victim.

Mr. Sampson stated that "Topper" Goodrich had threatened him with a gun, and had ordered him out of the car. He said that Bernard Matthews had gotten into the back seat, and that Matthews had struck him (Sampson) on the back of the head.

Trooper Herring gave this information to all cars; at 4:45 p.m. Sgt. Walter Lemaire located the car parked on US Rt. 7, one half mile south of the State Police Barracks in Middlebury. Sgt. Lemaire arrested Goodrich for Operating Without the Owner's Consent on an Officer's Complaint.

Matthews was arrested for intoxication by Corporal Lilly and was in possession of a weapon at this time. The weapon was one fully loaded ARCOA .22 caliber revolver, serial number 018251. At the time of their arrest both subjects were sitting in a 1963 Oldsmobile 4 door, model 88, registered to Ralph Sampson.

On May 16, 1971 Bernard Matthews was charged in an Information & Warrant issued by Ezra S. Dike, of aiding and abetting assault with intent to rob. The charge was reduced to aiding and abetting operating without the owner's consent, and Bernard Matthews was sentenced to not more than one year to the Windsor State Prison.

On an appeal the case was remanded back to the Court, and the original Warrant was reinstated. On February 17, 1972 Bernard entered a plea of Not Guilty, and the case was continued for trial.

The trial was held on April 24 and 25, 1972, and on April 25 the Jury returned a verdict of Guilty.

The Judge continued the case until May 12 for the filing of motions, and on May 12 the time was extended until May 15. On May 22 a Hearing was held on the motions, one for judgement of innocence, notwithstanding the verdict, and another motion for a new trial. Both motions were denied, and on May 25 Judge Hilton H. Dier entered judgement on the verdict, and ordered a presentence investigation.

#### DEFENDANT'S VERSION:

The following is a summary of the statement given to this Officer by Bernard Matthews:

Bernard stated that this was not an armed robbery. He stated that "Topper" Goodrich had known this man for sometime, and that he was merely riding with "Topper". He said that he did have a gun at the time, but that no threats were made, and that he does not recall at any time hitting Mr. Sampson.

He admits that he was highly intoxicated at the time of incident, and remembers the events only in a vague sort of a way.

#### CONVICTION RECORD:

The Criminal Index in Vermont discloses no record on this subject.

A record check with the State of Massachusetts discloses the following:

On January 20, 1967, Breaking & Entering in the Nighttime with Intent to Commit a felony. Sentenced to 18 months in the House of Correction.

October 27, 1969, Breaking & Entering, Larceny, two years Plymouth House of Correction (Mass.), suspended. Suspension revoked January 20, 1969, and committed to two years at the Plymouth House of Correction.

October 1, 1970, Escape, sentenced to two months concurrent with the sentence he was then serving.

According to Mr. William Sollen, Parole Officer/Supervisor, Bernard had six months to serve for his violation of Parole, but the parole has now run out, and they do not want him on this violation.

FAMILY HISTORY:

Father: Bernard F. Matthews, Sr., age 52, was born in Charlestown, Massachusetts. He attended Somerville schools, and graduated from Somerville High in 1937. He is presently a helper around the Beer truck, having worked for the Company for the past twelve years. He has always been in good health, and he has served in the European Theater in the United States Army during World War II for forty-four months.

Mother: Lillian (Francq) Matthews, age 50, was born in Mons, Belgium. She married Mr. Matthews in Belgium in 1947 and came to the United States with him. She had no health problems. There were two boys as a result of this marriage. She sought and was granted a divorce in Los Vegas in 1964. She visited the home last summer, but has lived in Mons, Belgium since the divorce.

Brother: Eugene Matthews, age 24, was educated in the Somerville schools, and graduated from Somerville Trade School. He is a cabinet maker by trade, married and has one child. He has never had any trouble with the law.

PERSONAL HISTORY:

Bernard F. Matthews, Jr. was born on September 17, 1945 in Somerville, Massachusetts. He had only the usual childhood diseases, and at present he has no health problems.

He attended elementary school in Somerville, Massachusetts, obtaining B's and C's and was truant only a few times. He attended the Northeastern Junior High School where he maintained similar grades, played basketball for two years.

Towards the end of the ninth grade, he dropped out because "it didn't agree with him". His father states that he began working mostly doing odd jobs, and during the good weather he worked doing house painting for contractors.

He never held any one job for very long, however, and has maintained job pattern through the years.

According to the father, he is rather good natured, and it would not be unusual for him to visit his fourteen cousins and give them each a dollar when he was working. He has never served in the Armed Forces, and was not called in the Draft, though he is physically fit.

His father says that he has had, maybe, a half of a dozen stolen car offenses, but he was never the driver, always the helper.

According to the father, he went for a ride to Vermont with a friend who wanted to collect some money owed to him. The debtor apparently had no money so the friend took his car, and the present Complaint resulted.

The foregoing information was received from an interview with Bernard's father by Probation Officer, McGraff, in Wburn, Massachusetts.

#### SUMMARY:

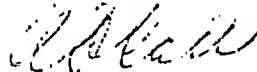
Bernard Matthews is before the Court for sentencing after having been convicted by a Jury of aiding and abetting assault with intent to rob. This is his first offense in Vermont, although he has been convicted of at least two Breaking and Entering offenses in Massachusetts, and one Escape offense in Massachusetts.

He has also been charged with Escape from the Correctional Facility in Rutland, Vermont. I feel that it should be brought to the Court's attention, that Bernard has already served over one year since having been arrested for this offense.

#### RECOMMENDATION:

It is respectfully recommended to the Court that any sentence imposed on Bernard Matthews be served. It is further recommended that credit be given on the sentence for the length of time that has already been served.

Respectfully submitted,



Marcus A. Carr  
PROBATION & PAROLE OFFICER

MAC/jsh



CONFIDENTIAL  
FOR THE COURT

PRESENTENCE REPORT

DATE: April 11, 1973

P.O.: Bert B. Barrett

VERMONT DISTRICT COURT, UNIT #1  
RUTLAND CIRCUIT

JUDGE: E. G. McLallen, Jr.

DEFENDANT: Bernard Frederick Matthews, Jr. DOB: 9/17/45 AGE: 27

RESIDENCE: 241 Lexington Street  
Woburn, Mass. POB: Somerville, Mass.

OFFENSE: Arson - First Degree  
Docket #1935-72Rcr

PLEA: Not Guilty

ASSISTANT STATE'S ATTORNEY: Stephen L. Klein

DEFENSE ATTORNEY: John Liccardi

DATE CONVICTED: March 8, 1973 Guilty Verdict - Trial by Jury.

ARREST SUMMARY:

The Vermont State Police received a call on 6/1/72 to investigate a fire in the cell block at the Rutland Community Correctional Center at 73 Center Street, Rutland, Vermont. Det. Lee Jones surveyed the damage done and interrogated the men in the cell block at the time of the fire (9:30 P.M. on 6/1/72). He took statements from several inmates who stated that the defendant and Steven J. Murray crumpled up newspapers and other pieces of paper and placed them behind the wooden doors between the cell block and the dining room. Then they lit matches and set fire to the papers which burned for approximately fifteen minutes causing damage to the doors, the walls and the ceiling and had to be extinguished by the Rutland Fire Department. The heavy smoke created had to be ejected, also.

The information was turned over to the state's attorney's office who brought the charge against the defendant.



Re: Bernard F. Matthews, Jr.

-2-

DEFENDANT'S VERSION:

The defendant was interviewed at the State Correctional Facility at Windsor and he stated that he was playing cards with some of the other inmates when the fire started and he didn't have anything to do with it. He also said that the inmate (Philip Morse) who said he saw him light matches and set the fire lied because he is crazy and can't think straight and shouldn't have been let out of the State Hospital to testify against him. He intends to have his lawyer file an appeal of the guilty verdict.

VICTIM'S STATEMENT:

Superintendent William D. White of the Rutland Community Correctional Center stated that the fire damaged the doors, walls and ceiling in the hallway leading to the cell block and seriously endangered the lives of the inmates.

He believes that the defendant has shown by his behavior and lack of cooperation that he is not a suitable person for community oriented rehabilitation programming.

CONVICTION RECORD:

The following information was furnished by the F.B.I., Washington, D.C.:

H of C Billerica Mass.	10/30/64	Using M/V W/O Auth	1 yr.
H of C Plymouth Mass.	10/29/69	B & E	2 yrs.
SPR & H of Corr for Men Windsor, Vt.	8/9/71	Aiding and abetting operating without owner's consent	0-9 mos.
Dept. of Pub. Safety Redstone, Montpelier	5/15/71	1. Aiding & abetting in armed robb. 2. Intox.	2. Guilty and p F of \$10.00

1. Amendment struck on 2/16/72 when case appealed glty by jury trial on 4/25/72 sent on 6/2/72 to not less than 3 yrs. nor more than 10 yrs. State's Prison susp. & placed on prob with special term as soon as legally able to do so to leave the state and will not return without special written permission by the Director of Division of Parole Dept. of Corr.

Re: Bernard F. Matthews, Jr.

-3-

Dept. of Pub. Safety  
Redstone, Montpelier

3/12/72

Escape (from  
Rutland Corr.  
Center)

11/14/72 sentenced  
0-247 days with  
credit for 247 days  
time served.

In addition, the following information is from a record check in the State of Massachusetts contained in a Presentence Report prepared by P.O. Marcus A. Carr on 3/21/72 for Vermont District Court, Addison Circuit, Unit #2, Middlebury, Vermont:

- #1. 1/20/67 B&E, Nighttime with Intent to Commit a Felony. Sentenced to 18 months in the House of Correction, Plymouth, Mass.
- #2. 10/1/70 Escape from House of Correction, Plymouth, Mass. Sentenced to serve 2 months concurrent with conviction for B&E on 10/29/69.

He is still on probation in Vermont on the suspended 3-year to 10-year sentence handed down in Vermont District Court, Addison Circuit on 6/2/72.

FAMILY:

The following information was received from the defendant and from a Presentence Report prepared by P.O. Marc Carr on 3/31/72 for Vermont District Court, Addison Circuit, Unit #2, Middlebury, Vermont and was not verified:

Father: Bernard F. Matthews, Sr. was born in Charlestown, Mass. in 1920. He is a high school graduate and served honorably in the U.S. Army for 3½ years in World War II.

He has worked as a truck driver most of his life and is currently employed.

Mother: Lillian Francq Matthews was born in Mons, Belgium in 1922. She married the defendant's father in Belgium and they returned to the United States and lived together until shortly after the birth of her second child by him.

She was granted a divorce in 1964 and returned to live in Belgium where she still resides.

The defendant has had no contact with her since 1964 until last summer when she visited him on a vacation trip to the United States.

Re: Bernard F. Matthews, Jr.

-4-

PERSONAL HISTORY:

Bernard F. Matthews, Jr. was born in Somerville, Mass. on 9/17/45. He attended public schools and dropped out near the end of ninth grade at age 16 because he didn't like school.

He hung around for a couple of years at home just loafing. He lived with his father, grandmother and brother after his mother left the home and his father supported them.

He enlisted in the National Guard in 1963 and was doing his six months tour of federal duty in 1964 at Fort Dix, New Jersey when he got involved in a drunken episode involving breaking the window of a liquor store that resulted in his being discharged after approximately four months of service.

He returned to Massachusetts to live with his family and worked sporadically at a number of jobs of short duration, such as, factory laborer, short order cook, construction laborer and house painter.

In 1971 he came to Vermont with a friend and got into trouble apparently because of a drinking spree which resulted in convictions for intoxication, aiding and abetting in armed robbery, escape, and arson, first degree. He has been detained in Vermont for lack of bail since May 15, 1971.

According to his statements, he has used intoxicating beverages to excess frequently in the past and he has used drugs quite frequently for about three years but doesn't feel he has a habit.

He stated he gets along well with his father and brother and intends to return to live with his father when he is released.

MARITAL:

He has no marital plans, at present.

FINANCIAL STATUS:

He has no assets of any kind, at the moment.

Re: Bernard F. Matthews, Jr.

-5-

SUMMARY:

The Court is concerned with an unmarried, twenty-seven-year-old high school dropout with little work experience and no apparent motivation to better himself. He admits to excessive use of alcoholic beverages and claims to have used drugs over a period of three years but not to the point that he has a habit.

He has previous convictions of a serious nature and has been incarcerated twice for felonies committed in Massachusetts. He has also been convicted twice of Escape (Vermont and Mass.) and is presently on probation in Vermont on a suspended 3-year to 10-year sentence for aiding and abetting in an armed robbery.

He completed approximately four months of federal service on a National Guard enlistment before he was discharged for cause.

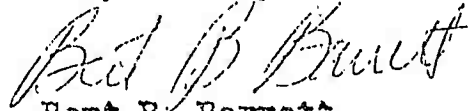
During the period of his detention in Vermont, he has not cooperated or shown any desire to change his attitude or behavior to better himself.

According to a statement made by his father to Mass. Probation Officer McGraff in Woburn, Mass. last year, the defendant is rather good natured and generous to his relatives.

RECOMMENDATION:

The defendant doesn't appear to be ready for placement in the community on probation; therefore, it is recommended that the sentence handed down in this case be served in a closely structured environment other than a regional correctional center.


Respectfully submitted,



Bert B. Barrett  
Probation and Parole Officer

BBB:ve

Approved:

  
Donald E. Hess  
Supervisor

1 STATE OF VERMONT

2 RUTLAND COUNTY, SS.

3  
4 STATE OF VERMONT

DISTRICT COURT OF VERMONT

5 VS.

UNIT #1, RUTLAND CIRCUIT

6 BERNARD F. MATTHEWS

DOCKET NO. 1935-72-Rcr

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12 SENTENCING

13 APRIL 16, 1973

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23 APPEARANCES:

24 STEVEN L. KLEIN, ESQ., RUTLAND COUNTY DEPUTY STATE'S ATTORNEY.

25 JOHN S. LICCARDI, ESQ., ATTORNEY FOR THE RESPONDENT.

1 COURT. Take up Docket No. 1935-72-Rcr,  
2 State vs. Bernard F. Matthews, who is here with  
3 Attorney, John Liccardi, the Public Defender. The  
4 State is represented by Stephen Klein and Burt  
5 Barrett, probation officer, is at the State's table.  
6 There was a jury trial held on the 7th and 8th  
7 of March, 1973. Mr. Matthews was charged with  
8 first degree arson and verdict on 8th of March  
9 of guilty and judgment of the verdict. Pre-sentence  
10 was ordered. We have received it and discussed  
11 it in chambers. Everyone has had a chance to read it.  
12 Purpose of the hearing this morning is to impose  
13 sentence. Mr. Klein.

14 MR. KLEIN. Your Honor is fully aware  
15 of the facts in this case. It went to a full  
16 and complete jury trial and the verdict was  
17 entered on March 8, 1973 by the jury of guilty  
18 as charged. You have here a man with extensive  
19 record. A number of felony convictions. A  
20 man who has been given a chance before and has  
21 not proved himself capable to the task. You  
22 have a man before you that is very, very  
23 impulsive and acted out in a very, very violent  
24 manner with something that he does not agree  
25 with. I think there comes a time in Mr. Matthews

1           MR. KLEIN. case that the public has to  
2           be protected , public has to be considered.  
3           We have a pendulum that swings, maybe completely  
4           to left when the person gets involved for  
5           the first time with the law with the public's  
6           interest on the right and the victim of the  
7           crime on the left and whereas; that party  
8           refuses to follow the task of probation and  
9           refuses to become a useful citizen in society  
10          then the pendulum swings further toward the  
11          side of the public and I think in this case  
12          the pendulum is just about the other way.  
13          While I have no specific recommendation, I  
14          think, your Honor, is fully familar with  
15          the facts of the case and I think that in  
16          the interest of justice public should be given  
17          a fair shake in this matter.

18          COURT. Mr. Liccardi.

19          MR. LICCARDI. Your Honor, the Court is  
20          aware of the facts. I think it should be  
21          pointed out the public has an interest in  
22          seeing that its citizens, who perhaps go off  
23          the path , should be rehabilitated and brought  
24          back and made meritorious members of the  
25          society. I don't think that Mr. Matthews is  
any different in this matter. I think he is

1 MR. LICCARDI. human being and member of  
2 society and although he may have gone wrong  
3 "X" number of times in the past, society does  
4 have an obligation to do what it can to see that  
5 Mr. Matthews becomes a useful and meritorious  
6 citizen and I would ask that the Court keep  
7 this in mind when imposing sentence.

8 COURT. Mr. Matthews, would you stand up,  
9 please? Mr. Matthews, is there anything that  
10 you would like to state in your behalf?

11 MR. MATTHEWS. No, your Honor.

12 COURT. Mr. Matthews, as you understand,  
13 this is very serious charge. The legislature  
14 has seen fit to fix a penalty of not less than  
15 two years nor more than ten years. We have  
16 read your pre-sentence over very carefully.  
17 We have noticed your list of previous  
18 convictions and it seems to be a trend in  
19 there that you more or less like to stay  
20 incarcerated. We think that the seriousness  
21 of this offense is such that probably should  
22 get a great deal more of penalty than I am  
23 going to give you but because your attorney,  
24 Mr. Liccardi, has convinced me that regardless  
25 of how I felt originally on here, that you



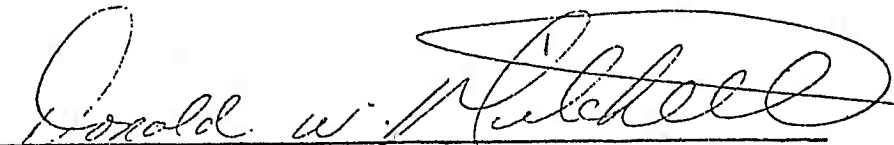
1 COURT. are entitled to be treated as a  
2 human being and given a chance fore rehabilitation,  
3 even though there doesn't appear to be so from  
4 the pre-sentence investigation. I am going to  
5 give you the opportunity to be rehabilitated  
6 after what I think is a reasonable length of  
7 time. Sentence. Of this Court is that you shall  
8 be committed to the care and custody of the  
9 Commissioner of Corrections for a period of  
10 ~~not less than 3 years nor more than 10 years~~  
11 with credit for 153 days spent incarcerated  
12 while awaiting trial and sentence.

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14 (HEARING CONCLUDED)  
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C E R T I F I C A T E

I, Donald W. Mitchell, Notary Public and  
Official Court Reporter, hereby certify that the  
foregoing pages, numbered 1 - 4, inclusive are a  
verbatim transcription of my verbatim stenographic  
notes of the Sentencing held before me as Notary  
Public on the 16th day of April, 1973 and transcribed  
under my direction for use in the matter of State  
of Vermont vs. Bernard F. Matthews, Docket No. 1935-72-  
Rcr.

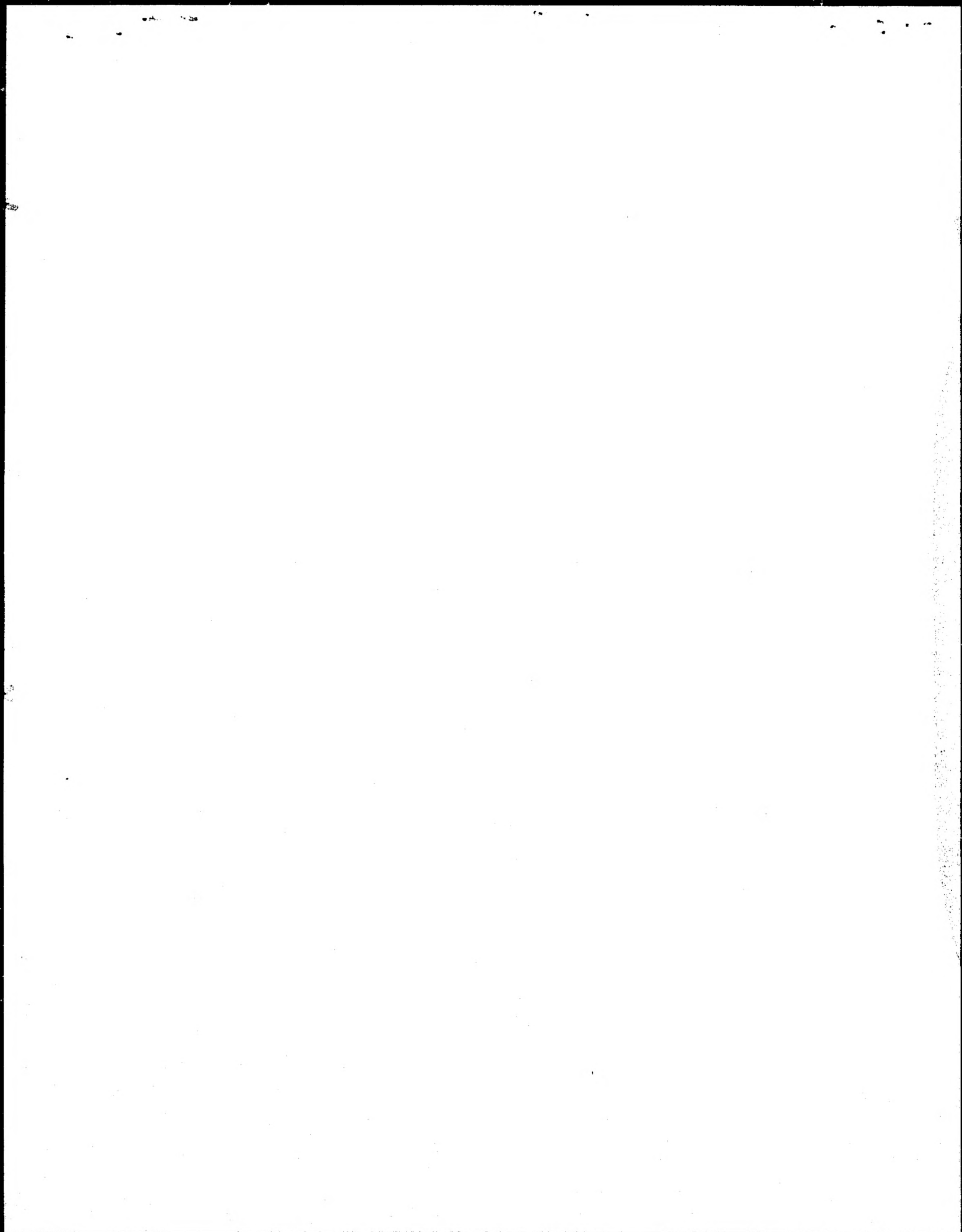
  
Notary Public and Official Court Reporter

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BERNARD MATTHEWS  
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Petitioner - Appellant  
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:  
-against-  
:  
No. 74-1032  
:  
JULIUS MOEYKENS  
:  
AFFIDAVIT OF SERVICE  
:  
BY MAIL  
:  
Respondent - Appellee  
:  
:  
-----X  
STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

JEFFREY L. LAYTIN, being duly sworn, deposes and says that I am an attorney associated with Eric Kronfeld, Esq., who is counsel for the Petitioner-Appellant on the above captioned appeal. On the fifteenth day of April 1974 I served the Brief and Appendix for Petitioner-Appellant in the above captioned appeal upon the Attorney General for the State of Vermont by depositing two (2) true copies of same enclosed in a postage paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

15th day of April, 1974

Harriette C. Bernella  
**Notary Public**  
 Notary Public, State of New York  
 No. 31-7905385  
 Qualified in New York County  
 Commission Expires March 30, 1976



STATE OF NEW YORK, COUNTY OF

ATTORNEY'S CERTIFICATION

I, \_\_\_\_\_ an attorney admitted to practice in the State of New York, do hereby  
certify pursuant to Sec. 2105, CPLR, that I have compared the within  
with the original and have found it to be a true and complete copy thereof.

Dated:

19

Signature.....

Typed or Printed Name.....

STATE OF NEW YORK, COUNTY OF

AFFIRMATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the State of New York, affirms: That the undersigned is  
the attorney(s) of record for  
in the within action; that the undersigned has read the foregoing  
and knows the contents thereof; that the same are true to affirmant's own knowledge, except as to the matters therein  
stated to be alleged on information and belief; and as to those matters affirmant believes them to be true.

The undersigned further states that the reason this affirmation is made by the undersigned and not by

The grounds of affirmant's belief as to all matters not stated to be upon affirmant's knowledge, are as follows:

The undersigned affirms that the foregoing statements are true, under the penalty of perjury.

Dated:

19

Signature.....

Typed or Printed Name.....

STATE OF NEW YORK, COUNTY OF

ss.:

INDIVIDUAL VERIFICATION

deponent is \_\_\_\_\_ the \_\_\_\_\_, being duly sworn, deposes and says that  
read the foregoing in the within action; that deponent has  
the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and  
belief, and that as to those matters deponent believes them to be true. and knows the contents thereof; that

Sworn to before me, this

day of

19

STATE OF NEW YORK, COUNTY OF

ss.:

CORPORATE VERIFICATION

of  
named in the within action; that deponent has read the foregoing  
and knows the contents thereof; and that the same are true to deponent's own knowledge, except as to the matters therein  
stated to be alleged upon information and belief, and as to those matters deponent believes them to be true.  
This verification is made by deponent because  
is a corporation. Deponent is an officer thereof, to-wit, its  
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF

ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is  
not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within  
upon the attorney(s) for  
in this action, at

the address designated by said attorney(s)  
for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official deposi-  
tory under the exclusive care and custody of the United States Post Office within the State of New York.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF

ss.:

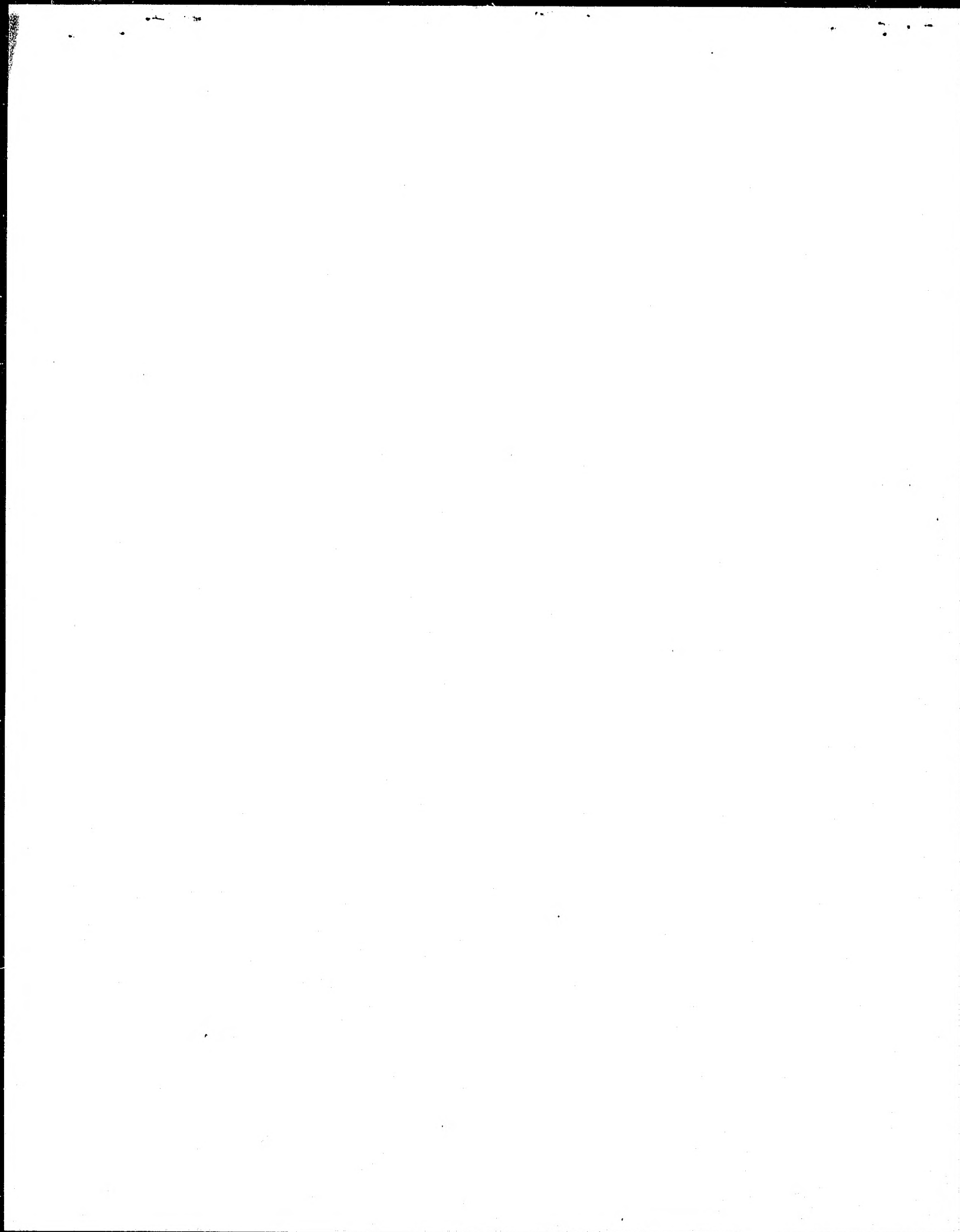
AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is  
not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No.  
deponent served the within

upon  
by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person men-  
tioned and described in said papers as the therein.

Sworn to before me, this day of 19 .....



NOTICE OF ENTRY

Sir :

Please take notice that the within is a true copy of a

duly entered in the within named court on

19

Dated,

Yours, etc.,

MARTIN J. MACHAT

Attorney for

Office and Post Office Address

1501 BROADWAY

New York, N. Y. 10036

To

Attorney for

NOTICE OF SETTLEMENT

Sir :

Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named court,

at

on the day of 19

at M.

Dated,

Yours, etc.,

MARTIN J. MACHAT

Attorney for

Office and Post Office Address

1501 BROADWAY

New York, N. Y. 10036

To

Attorney for

Index No. 74-1032 Year 19 74

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

BERNARD MATTHEWS

Petitioner-Appellant

-against-

JULIUS MOEYKENS

Respondent-Appellee

AFFIDAVIT

~~MARTIN J. MACHAT~~  
ERIC KRONFELD,

Attorney for Petitioner-Appellant

Office and Post Office Address

1501 BROADWAY

New York, N. Y. 10036

563-6440

To

Attorney for

Service of a copy of the within

is hereby admitted

Dated,

19

Attorney for



LS

t